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No. 10-

IN THE

Supreme Court of the United States

JAMES E. JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 17, 2010

QUESTIONS PRESENTED

1. What is the jurisdictional reach of the False Statements Act, 18 U.S.C. § 1001?

2. Is the submission of false timesheets by an employee to his private employer, a subcontractor to a prime contractor on a government contract, within the jurisdiction of the United States for purposes of a prosecution under the False Statements Act, when those timesheets submitted by the employee were never presented to nor seen by a single government official?

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James E. Jackson ("Petitioner"), petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 608 F.3d 193 (4th Cir. 2010) and is reproduced in the Appendix at App. 1.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were entered on June 24, 2010. This Petition is filed within 90 days of that judgment pursuant to Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1001

18 U.S.C. § 1001 provides that whoever knowingly and willfully makes a material false statement "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the

United States" shall be fined under Title 18 of the United States Code and imprisoned up to five years. 18 U.S.C. § 1001(a).

STATEMENT OF THE CASE

I. Statement of Facts.

In or about July 2003, the National Security Agency ("NSA") contracted with Computer Sciences Corporation ("CSC") to obtain certain messaging services. (App. 3) NSA is a component of the Department of Defense, part of the Executive branch of the United States government. (*Id.*) CSC is a private government contractor. (App. 1)

CSC had also entered into a subcontract with a division of Northrop Grumman Corporation ("NG"), another private government contractor. (*Id.*) Pursuant to this subcontract, certain NG employees worked on the Messaging Services Contract. (App. 3) The Appellant, James E. Jackson, was employed full-time by NG, and worked on the Messaging Services Contract. (*Id.*) Mr. Jackson, who had been approved for contractor access to Sensitive Compartmented Information (SCI) by NSA Security's Adjudications Division, performed his duties on the Messaging Services Contract within NSA Headquarters. (*Id.*)

NG required Mr. Jackson to submit a timesheet in

electronic form for every two-week pay period to NG. (*Id.*) In those timesheets, Mr. Jackson was required to state the number of hours he had worked during those pay periods on the Messaging Services Contract. (*Id.*) Mr. Jackson received regular paychecks from NG in which he was paid, in part, based on the number of hours he had indicated to NG that he had worked on the Messaging Services Contract for the pay periods in question. (*Id.*)

Mr. Jackson filled out electronic timesheets and submitted them to his employer NG. (*Id.*) Based on the hours that Mr. Jackson claimed in his timesheets to have worked on the Messaging Services Contract, NG periodically invoiced CSC for such hours. (*Id.*) CSC, in turn, periodically invoiced NSA for the hours that Mr. Jackson claimed to have worked on the Messaging Services Contract. (*Id.*) After NSA received invoices from CSC, which included the amounts invoiced for hours Mr. Jackson had reported to NG, NSA paid CSC for such claimed hours at rates that were specified in the Messaging Services Contract. (*Id.*) CSC, in turn, made payments to NG for Mr. Jackson's claimed hours. (*Id.*)

Between September 2004, and January 2007, Mr. Jackson submitted false timesheets to NG claiming that he worked a total of approximately 834 hours more than he had actually worked on the Messaging Services Contract. (App. 4) CSC invoiced NSA for the hours that

Mr. Jackson claimed to have worked on the Messaging Services Contract. (*Id.*) This led to NSA paying CSC for hours not actually worked by Mr. Jackson. (*Id.*)

NSA did not learn of Mr. Jackson's unworked hours until after NSA had already paid CSC for those hours, and after CSC in turn had already paid NG for such hours. (*Id.*) If it had been determined that the terms of the Messaging Services Contract were not being met due to deficiencies related to an employee of NG, NSA's contracting officer would have worked directly with CSC's contracting office to determine how best to address the problem. (*Id.*) If the problem with NG was not then remedied, NSA would have had the option of terminating the contract with CSC or could have demanded repayment from CSC for hours not actually worked by the Defendant. (*Id.*) If an NSA auditor had received an allegation that Mr. Jackson was not working the hours he was claiming in his timesheets, the auditor would have had the authority to obtain timesheets and billing records from CSC and NG relating to Mr. Jackson in order to determine the amount of overpayment, so that NSA could seek to recoup that amount from CSC. (*Id.*)

By the time NSA's Office of Inspector General began its investigation of Mr. Jackson, he was no longer working on the Messaging Services Contract due to a Reduction in Force on the contract in November 2006. (*Id.*)

II. Decisions Below.

On March 11, 2009, the Petitioner, James E. Jackson was indicted on a twenty count indictment in the United States District Court for the District of Maryland. (App. 2) On April 6, 2009, Mr. Jackson filed a Motion to Dismiss the Indictment based on a lack of federal government jurisdiction. (*Id.*) On May 11, 2009, the Court issued a written opinion denying Mr. Jackson's Motion to Dismiss. (*Id.*) On May 28, 2009, and pursuant to a plea agreement with the United States that preserved his right to appeal the jurisdictional issue in this case, Mr. Jackson pled guilty to three counts of the twenty count indictment for violating 18 USC § 1001. (App. 2-3) Specifically, Mr. Jackson pled guilty to three counts involving three pay periods in July and August 2006. (App. 5) For those periods, Mr. Jackson claimed to have worked a total of sixty-two and one-half hours that he did not actually work. (*Id.*) On June 24, 2010, the Fourth Circuit affirmed in a published opinion that the United States of America did have false statement jurisdiction over Mr. Jackson's false timesheets submitted to his employer, the subcontractor on the government contract.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case presents an important question over which the federal appellate courts are divided concerning the United States' jurisdictional reach in prosecuting false statements.

The Fourth Circuit opinion noted the jurisdictional split and firmly decided to side with the circuits expanding the reach of the False Statements Act by finding that jurisdiction existed over Mr. Jackson's false timesheets to his private employer, a subcontractor on a government contract.

The jurisdictional reach of the False Statements Act has not been decided by the Supreme Court, though the Court has previously opined on various aspects of the False Statements Act and its various iterations over the years. In 1984, two cases were decided by the Supreme Court that set out some key parameters for the proper use of the Act by prosecutors. In *United States v. Yermian*, 468 U.S. 63, 74-75 (1984) the Supreme Court held that an individual could be prosecuted under 18 U.S.C. § 1001 even if he or she lacked knowledge of the United States' jurisdiction over the false statement. All that was required was knowledge of the falsity of the statement itself. In that same year, the Supreme Court also decided the one case that has since guided lower courts as to the jurisdictional element of the statute. The test since 1984 has been that the statute will confer

jurisdiction when the agency "has the power to exercise authority in a particular situation" in which the false statement arose. *United States v. Rodgers*, 466 U.S. 475, 480 (1984). "Understood in this way, the phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Id.* at 479. Statements that merely concern "matters peripheral to the business of [the agency or department]" are not subject to prosecution under § 1001. *Id.* This guidance has led to an ever-increasing use of the False Statements Act as the federal government takes a more and more omnipresent role in the ordinary lives of the citizenry, and the United States continues to assert that fewer and fewer false statements are matters "peripheral" to the interest of any particular branch of the United States government.

The *Rodgers* court went on to find that "[t]here is no doubt that there exists a 'statutory basis' for the authority of the FBI and the Secret Service over the investigations sparked by respondent Rodgers' false reports. The FBI is authorized 'to detect and prosecute crimes against the United States,' including kidnapping. 28 U.S.C. § 533(1). And the Secret Service is authorized 'to protect the person of the President.' 18 U.S.C. § 3056.... There is, therefore, a 'valid legislative interest in protecting the integrity of [such] official inquiries,' an

interest clearly embraced in, and furthered by, the broad language of § 1001." 466 U.S. at 481-82. No such investigative link existed here for the National Security Agency.

The Fourth Circuit discounted the fact that Mr. Jackson's timesheets were never shown to nor seen by any government agent at the time they were submitted by finding "jurisdiction" over Mr. Jackson in other ways. The Fourth Circuit stated:

> While we think that the executive branch's authority to safeguard federal funds is a sufficient jurisdictional nexus on its own, in this case that link is augmented by other, even more direct controls that the executive branch exercised over Jackson. Specifically, it had the power to revoke Jackson's security clearance and his access to his NSA job site and ultimately to terminate its contract with CSC. Indeed, Jackson was only able to work on this project for NG because he was authorized to do so by NSA Security. Taken together, the power to safeguard federal funds and the ability of the executive branch to effectively terminate Jackson's employment on the Contract provide an ample basis to find federal jurisdiction.

608 F.3d at 198.

Under such a rationale, any individual either

working for or accessing a government building, installation, or possibly even a government computer, could be subject to a false statement act prosecution. While the federal government would not have jurisdiction over a driving while intoxicated charge that occurred in a county municipality, or a false statement made to that local arresting officer pursuant thereto, the federal agency might still ban that individual from working at its installation *as a result of* such a charge. This does not however convey jurisdiction over the prior crime to the federal government. Similarly, the agency's ability to react to Mr. Jackson's act of theft from his employer – all of which occurred outside of the NSA's physical offices – and ban him from his employment site does not confer jurisdiction over the prior criminal act itself. The Fourth Circuit's justification and rationale should not be accepted as the proper jurisdictional reach of this statute, as Congress never intended to enact such a sweeping jurisdictional trap for the unwary.

There is currently a disagreement in the federal appellate courts over how far the False Statement Act's jurisdiction should extend.

In affirming the district court, the Fourth Circuit noted the majority of jurisdictions that condition a false statement to its effect (however indirect) on the public fisc.

[W]e think it plain that the executive branch has the authority (if not the duty) not to pay a false invoice, no matter through how many intermediaries' hands it passes. This constitutes a substantial power to act, and other circuits have long reached essentially similar conclusions. *See United States v. Ross*, 77 F.3d 1525, 1544-45 (7th Cir.1996) ("[T]he jurisdictional nexus between the agency and the entity for purposes of § 1001 stems from the agency's ultimate duty to safeguard the proper spending of federal funds.") (citing, *inter alia*, *United States v. Stanford*, 589 F.2d 285, 297 (7th Cir.1978) ("It is the general rule ... that a statement may concern a matter within the federal jurisdiction described in section 1001, even if the statement is not submitted directly to the federal department or agency involved, and the federal agency involvement is limited to reimbursement of expenditures.")); *United States v. Gibson*, 881 F.2d 318, 323 (6th Cir.1989) ("Protecting itself against being wrongfully overcharged is clearly an 'official, authorized function[ ]' of [a governmental agency], not a 'matter[ ] peripheral to the business of that body.' ") (citing *Rodgers*, 466 U.S. at 479); *United States v. Facchini*, 874 F.2d 638, 643 (9th Cir.1989) (finding jurisdiction when defendants submitted false statements to a state agency, but ultimately "gained ... benefits paid

> out of the federal fisc ..."); *United States v. Wolf*, 645 F.2d 23, 25 (10th Cir.1981) (Jurisdiction exists when "[t]he federal government ... either partially funds the program under which the undeserved benefits are requested or reimburses the agency for its expenditures.") (citing *United States v. Baker*, 626 F.2d 512, 514 n.5 (5th Cir.1980) ("[T]he necessary link between deception of the non-federal agency [or private company] and effect on the federal agency is provided by the federal agency's retention of 'the ultimate authority to see that the federal funds are properly spent.'") (citation omitted)); *United States v. Candella*, 487 F.2d 1223, 1226 (2d Cir.1973) (finding jurisdiction when "[t]he United States became ultimately responsible for paying 100%" of the false invoice). Accordingly, we do not consider the authority to safeguard federal funds to be merely peripheral, but rather an official, authorized function of the executive branch.

608 F.3d at 197-98.

This case however, is remarkably similar to a recent decision by the Ninth Circuit not addressed by the Fourth Circuit opinion, *United States v. Holstrom*, 242 Fed. Appx. 397, 2007 WL 1483892 (9th Cir. 2007). In that case, the government appealed from the dismissal of an indictment under 18 U.S.C. § 1001. Tina Holstrom

was charged with making materially false statements in violation of § 1001 in connection with allegedly false time card entries she submitted to her employer Batelle Memorial Institute, a prime contractor of the United States Department of Energy ("DOE"). In affirming the dismissal of the indictment, the Ninth Circuit stated:

> Nor does the PNNL contract provide DOE with the "power to act" in response to Holstrom's alleged falsification of time cards. Rather, the PNNL contract provided that Batelle was wholly responsible for "the total performance under the contract" including all "disciplinary action with respect to [Batelle's] employees as may be necessary." All employment matters with respect to Holstrom's hiring, investigation and termination were handled by Batelle.

242 Fed. Appx. at 398; 2007 WL 148389, at *2.

Similarly in this case, the NSA did not have any direct contractual authority over Jackson, and indeed Jackson was supervised solely by CSC personnel. NSA could act against NG, and thus Jackson, only by working through CSC, as set out by the contract.

In 1944, the Fifth Circuit addressed a case directly analogous to Mr. Jackson's in *Lowe v. United States*, 141 F.2d 1005 (5th Cir. 1944). The defendant in *Lowe* falsified time cards submitted to his employer, the

Alabama Dry Dock and Shipbuilding Company. At the time the defendant worked for the company, it was involved in building ships for the federal government under contract. Interpreting the scope of the predecessor statute to 18 U.S.C. § 1001, (the 1934 version referred to in *Yermian)* the Fifth Circuit ruled that the defendant's false statements to his employer did not constitute false statements within the jurisdiction of the United States.

In *United States v. Blankenship*, 382 F.3d 1110, 1138 (11th Cir. 2004) the 11th Circuit cited *Lowe* as authority and pointed out that "if § 1001 were interpreted to prohibit any false statement to any private entity whose funds, in whole or in part, happened to originate with the federal government, the results would be shocking." *Id.* at 1137. The court noted that, "under the Government's theory, any teachers in inner-city public schools that receive federal subsidies who take sick days when they're really going to the beach can find themselves spending some quality time with a bright young Assistant United States Attorney." *Id.* at 1138. "While Congress may be constitutionally empowered to criminalize this broad range of conduct, we simply do not believe that it chose to do so, especially not through a statute such as § 1001." *Id.* at 1138.

The Fourth Circuit noted in its opinion that "[i]n both of these cases, the court reversed the defendants'

convictions under § 1001 (or its predecessor in the *Lowe* case), finding a lack of federal jurisdiction. We find both cases distinguishable, however, and to the extent that they cannot be distinguished, we follow the majority of circuits." 608 F.3d at 199. The Fourth Circuit did not address the *Holmstrom* decision.

While there are statutes directly related to false statements in health care matters, 18 U.S.C § 1035, as well as false statements made in claims to the United States, 18 USC § 287, and other specific areas of federal concern, the expanding reach of 18 USC § 1001 will make all other false statement related statutes irrelevant and unnecessary, unless the jurisdictional limits on this statute are set forth more clearly by this Court.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. Following review, the judgment should be reversed.

Respectfully submitted,

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APPENDIX

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False Statements Act, 18 U.S.C. § 1001 .....App.18

UNITED STATES COURT OF APPEALS,
For The Fourth Circuit

UNITED STATES of America, Plaintiff-Appellee,
v.
James E. JACKSON, Defendant-Appellant.
No. 09-4753.

Argued May 11, 2010
Decided June 24, 2010
(Published: 608 F.3d 193 (4th Cir. 2010))

Background: Defendant was convicted, upon a conditional plea of guilty, in the United States District Court for the District of Maryland, William M. Nickerson, Senior District Judge, of making false statements on matter within the jurisdiction of the executive, legislative, or judicial branch of the government, arising out of his submission of false timesheets to his employer, a government contractor. Defendant appealed.

Holding: The Court of Appeals, Wilson, J., held that defendant's falsified timesheets fell within jurisdiction of the NSA.

Affirmed.

*194 **ARGUED**: Steven F. Wrobel, Rosenberg, Martin, Greenberg, LLP, Baltimore, Maryland, for Appellant. Jonathan Biran, Office of the United States Attorney, Baltimore, Maryland, for Appellee. **ON BRIEF**: Rod J. Rosenstein, United States Attorney, Baltimore, Maryland, for Appellee.

Before KEENAN, Circuit Judge, HAMILTON, Senior Circuit Judge, and SAMUEL G. WILSON, United States District Judge for the Western District of Virginia, sitting by designation

Affirmed by published opinion. Judge WILSON wrote the opinion, in which Judge KEENAN and Senior Judge HAMILTON joined.

OPINION

WILSON, District Judge:

This is an appeal by James E. Jackson following Jackson's conditional guilty plea pursuant to a plea agreement to three counts of a twenty count indictment alleging violations of 18 U.S.C. § 1001 for making false statements on "a matter within the jurisdiction of the executive, legislative, or judicial branch of the Government." Jackson unsuccessfully moved to dismiss

the indictment in the district court. Jackson's false statements consisted of his submissions of false timesheets to his employer, Northrop Grumman Corporation ("NG"), a subcontractor for the prime contractor, Computer Sciences Corporation ("CSC"), on a time-and-materials contract with the National Security Agency ("NSA"). Jackson contends that these statements were not made in relation to a matter within the jurisdiction of the executive branch because, under the circumstances, NSA had no power to exercise authority. We reject Jackson's argument and affirm.

I.

A grand jury of the United States District Court for the District of Maryland indicted Jackson on twenty counts of violating 18 U.S.C. § 1001 for submitting false timesheets to his employer, which ultimately resulted in the expenditure of NSA funds. Jackson moved to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b)(3) on the ground that it failed to allege an offense over which the United States has jurisdiction. Jackson argued that his submission of "inaccurate timesheets to his employer, which in turn was a subcontractor to a general contractor to a United States agency, were not statements 'within the jurisdiction of any department or agency of the United

States under 18 U.S.C. § 1001.' " (J.A. 12.) The district court denied the motion, finding that the expenditure of NSA's funds was sufficient to invoke NSA's jurisdiction. (J.A. 206.) According to the district court, "the agency's ultimate duty to safeguard the proper spending of federal funds" provides the required jurisdictional nexus. (J.A. 206) (quoting *United States v. Ross*, 77 F.3d 1525, 1544 (7th Cir.1996)). The district court found NSA's "power to exercise authority" further augmented by its authority to revoke Jackson's security clearance, thereby denying him access to the work site (a NSA facility), as well as by its authority to terminate its contract with CSC. (J.A. 207.)

Following the denial of his motion to dismiss, Jackson entered into a plea agreement with the United States that called for Jackson to enter a conditional guilty plea to three of the twenty counts, while preserving his right to contest on appeal the district court's order denying his motion to dismiss the indictment. (J.A. 214.) Jackson then pled guilty pursuant to the plea agreement, and the district court received a stipulation of facts in support of the plea, which the parties further stipulated were not all the facts the government would have proven had the case proceeded to trial on a plea of not guilty.

According to the stipulation, at all relevant times NSA has been a component of the United States Department of Defense, which is part of the executive branch of the United States Government. In or about July 2003, NSA contracted with CSC to obtain certain messaging services. CSC provided those services under the terms of a time-and-materials contract (the "Contract"). CSC entered into a subcontract with a division of NG pursuant to which NG employees worked on the Contract. NG employed Jackson to work on the Contract at NSA headquarters at Fort George G. Meade, Maryland. The NSA Associate Directorate for Security and Counterintelligence ("NSA Security") granted Jackson access to the NSA site.

NG paid Jackson based on timesheets that Jackson submitted electronically every two-weeks. Those timesheets were supposed to reflect the hours that Jackson worked on the Contract during each pay period. Based in part on the hours that Jackson recorded on his timesheets, NG periodically invoiced CSC for the hours worked on the Contract. CSC, in turn, periodically invoiced NSA for the hours that Jackson reported working. NSA paid CSC for the hours, and CSC paid NG, which paid Jackson.

Between September 2004 and January 2007, Jackson

submitted numerous false timesheets to NG claiming that he worked approximately 834 hours more than he actually*196 worked on the Contract. CSC ultimately invoiced NSA for the hours Jackson falsely claimed to have worked and this led to NSA paying CSC for work Jackson did not perform. The government contends that this caused NSA to pay approximately $75,150 for unperformed work. Jackson disputes this amount, but acknowledges that the overpayment was between $30,000 and $70,000.

NSA did not learn of Jackson's unworked hours until after it had already paid CSC for those hours, and after CSC in turn had already paid NG for them. According to the stipulation, if NSA had determined that the terms of the Contract were not being met, NSA's contracting officer would have worked directly with CSC's contracting office to determine how best to address the problem. If CSC failed to remedy the timesheet issue, NSA would have had the option of either terminating the Contract with CSC or demanding repayment from CSC for hours Jackson did not work. If an NSA auditor had received an allegation that Jackson was not working the hours he claimed in his timesheets, the auditor would have had the authority to obtain timesheets and billing records in order to determine the amount of overpayment so that NSA could seek to

recoup that amount from CSC.

By the time NSA's Office of Inspector General began its investigation of Jackson's timesheets, he was no longer working on the Contract due to a "reduction in force." If, at any time while he was still working on the Contract, NSA Security had learned that Jackson had not actually worked all of the hours he had claimed in his timesheets, NSA Security could have suspended or revoked his access to NSA facilities and information. This would have prevented Jackson from performing any additional work on the Contract.

Jackson pled guilty to three counts involving three pay periods in July and August of 2006. For that period, Jackson falsely claimed to have worked a total of sixty-two and a half hours that he did not actually work. NG invoiced CSC for those hours, and CSC in turn invoiced NSA for them.

II.

Jackson argues that NSA was created by executive order, not by statute, and that therefore, it has "no statutory basis" to access his timesheets. It follows, he contends, that absent statutory authority "a key underpinning to the government's rationale is clearly

missing from this case and [the] conviction should be reversed." (Appellant's Brief at 10-11.) We find this reasoning flawed on a number of levels, reject it, and find that Jackson's falsified timesheets, which ultimately were invoiced by CSC to NSA, are matters within the jurisdiction of the executive branch under § 1001.

[1] Section 1001(a) makes it a crime to knowingly and willfully make a materially false, fictitious, or fraudulent statement or representation "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." The Supreme Court has held that the "within the jurisdiction" language of the statute "merely differentiates the official, or authorized functions of an agency or department from matters that are peripheral to the business of that body." *United States v. Rodgers*, 466 U.S. 475, 479, (1984). Accordingly, "the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001." *Id.* at 480. The term refers to the department's or agency's "power to exercise authority in a particular situation," *id.* at 479 and that *197 power need not include the power to make "final or binding determinations." *Id.* at 482.

[2] Before applying that practical, non-technical

standard to the particular situation at hand we note that Jackson's argument, which focuses exclusively on NSA's authority in relation to his falsified timesheets, does not properly frame the issue. In 1996, Congress amended the "jurisdictional" element of § 1001. *See* False Statements Accountability Act of 1996, Pub.L. No. 104-292, 110 Stat. 3459 (codified as amended at 18 U.S.C. § 1001 (2006)). The previous version specified that the matter pertaining to the false statement must be "within the jurisdiction of any department or agency of the United States." The 1996 amendment, however, "broadened the scope of the statute to include any matter 'within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.'" *United States v. Atalig*, 502 F.3d 1063, 1067 (9th Cir.2007). In light of the amendment, the question of jurisdiction here, when properly framed, is whether Jackson's falsified timesheets "fell within the jurisdiction of the executive branch." *Id.* at 1068. We conclude that they did.

In concluding that Jackson's false timesheets fell within the jurisdiction of the executive branch, we note first that we think it plain that the executive branch has the authority (if not the duty) not to pay a false invoice, no matter through how many intermediaries' hands it passes.[FN1] This constitutes a substantial power to act,

and other circuits have long reached essentially similar conclusions. *See United States v. Ross*, 77 F.3d 1525, 1543 (7th Cir.1996) ("[T]he jurisdictional nexus between the agency and the entity for purposes of § 1001 stems from the agency's ultimate duty to safeguard the proper spending of federal funds.") (citing, *inter alia*, *United States v. Stanford*, 589 F.2d 285, 297 (7th Cir.1978) ("It is the general rule ... that a statement may concern a matter within the federal jurisdiction described in section 1001, even if the statement is not submitted directly to the federal department or agency involved, and the federal agency involvement is limited to reimbursement of expenditures.")); *United States v. Gibson*, 881 F.2d 318, 323 (6th Cir.1989) ("Protecting itself against being wrongfully overcharged is clearly an 'official, authorized function[ ]' of [a governmental agency], not a 'matter[ ] peripheral to the business of that body.' ") (citing *Rodgers*, 466 U.S. at 479, 104 S.Ct. 1942); *United States v. Facchini*, 874 F.2d 638, 643 (9th Cir.1989) (finding jurisdiction when defendants submitted false statements to a state agency, but ultimately "gained ... benefits paid out of the federal fisc ..."); *United States v. Wolf*, 645 F.2d 23, 25 (10th Cir.1981) (Jurisdiction exists when "[t]he federal government ... either partially funds the program under which the undeserved benefits are requested or reimburses the *198 agency for its expenditures.")

(citing *United States v. Baker*, 626 F.2d 512, 514 n. 5 (5th Cir.1980) ("[T]he necessary link between deception of the non-federal agency [or private company] and effect on the federal agency is provided by the federal agency's retention of the ultimate authority to see that the federal funds are properly spent.") (citation omitted)); *United States v. Candella*, 487 F.2d 1223, 1226 (2d Cir.1973) (finding jurisdiction when "[t]he United States became ultimately responsible for paying 100%" of the false invoice). Accordingly, we do not consider the authority to safeguard federal funds to be merely peripheral, but rather an official, authorized function of the executive branch.

> FN1. Jackson cannot do indirectly that which he is prohibited from doing directly. 18 U.S.C. § 2(b) provides that "whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." As we explained in the context of another § 1001 case, "this section is intended 'to impose criminal liability on one who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and hence is innocent of the substantive crime charged....' " *United States v.*

> *Richeson*, 825 F.2d 17, 20 (4th Cir.1987) (quoting *United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir.1983)). We also have recognized that an intermediary theory of liability applies to offenses under 18 U.S.C. § 287, which prohibits the knowing presentation of a false, fictitious, or fraudulent claim to any agency or department of the United States. *See United States v. Blecker*, 657 F.2d 629, 633-34 (4th Cir.1981).

While we think that the executive branch's authority to safeguard federal funds is a sufficient jurisdictional nexus on its own, in this case that link is augmented by other, even more direct controls that the executive branch exercised over Jackson. Specifically, it had the power to revoke Jackson's security clearance and his access to his NSA job site and ultimately to terminate its contract with CSC. Indeed, Jackson was only able to work on this project for NG because he was authorized to do so by NSA Security. Taken together, the power to safeguard federal funds and the ability of the executive branch to effectively terminate Jackson's employment on the Contract provide an ample basis to find federal jurisdiction.

Jackson relies heavily on three cases: *Lowe v. United States*, 141 F.2d 1005 (5th Cir.1944), *United States v.*

Blankenship, 382 F.3d 1110 (11th Cir.2004), and *United States v. Facchini*, 874 F.2d 638 (9th Cir.1989). *Lowe* and *Blankenship*, however, are distinguishable from this case, and *Facchini* actually supports the Court's reasoning here.

In *Lowe*, the defendant was an hourly employee of a ship building company that was contracted by the United States to build ships. The defendant submitted false timesheets to the company, which paid him directly, but the company was ultimately reimbursed for the time by the United States. The *Lowe* court found that "[i]nsofar as the employee was concerned, every aspect of his employment was exactly the same as it would have been had there been no contract with any governmental agency of any kind." *Lowe*, 141 F.2d at 1006. The court also noted that the "contract for reimbursement of payroll payments ... did not designate the payroll department of the company as an agency of the United States, nor did it place that department under the control or supervision of any such agency." *Id.* Accordingly, the court held that "the mere allegation of the existence of the contract providing for reimbursement ... was not sufficient to make [the defendant's] alleged fraudulent misrepresentations to his employer an offense against the United States." *Id.*

In *Blankenship*, the defendants conspired to obtain road construction contracts that were federally mandated to be awarded to "disadvantaged business enterprises" ("DBEs"), that is, small companies owned by women or minorities. In that case, the United States Department of Transportation ("USDOT") gave a grant to the Florida Department of Transportation ("FDOT") for road construction that required at least 12% of the funds be awarded to DBEs. The FDOT, in turn, contracted with a large construction company, which subcontracted with an authorized DBE to perform some of the work. The owner of that DBE, who actually had no employees, then conspired with the owners of a non-DBE authorized company to do the work and receive payments from the primary contractor. To deceive the primary contractor, the defendants created *199 numerous false documents and records, all giving the impression that employees of the DBE were performing the work. Relying heavily on *Lowe*, the court held that those "false statements ... [were not] matters within the jurisdiction of the federal government." *Blankenship*, 382 F.3d at 1136. The court found that the USDOT had no direct control over the defendants, and that all the agency could do once it learned of the false documents was "to pressure the FDOT, under the terms of the FDOT's contract ... into pressuring [the primary contractor] into taking some sort of action." *Id.*

According to the court, "[t]his embarrassingly weak and indirect avenue of recourse demonstrate[d] the USDOT's lack of authority, and hence lack of jurisdiction, over ... the defendants." *Id.*

In both of these cases, the court reversed the defendants' convictions under § 1001 (or its predecessor in the *Lowe* case), finding a lack of federal jurisdiction. We find both cases distinguishable, however, and to the extent that they cannot be distinguished, we follow the majority of circuits.

In *Lowe,* the court highlighted the fact that the defendant's employment was entirely unaffected by the existence of the federal contract. In contrast, here NSA Security had the power to revoke Jackson's clearance (and his access to the work site), terminating his ability to work on the Contract at any time, and NSA had the power to terminate its Contract with CSC (and therefore NG) if it had discovered the fraudulent activity. Consequently, the circumstances here are quite unlike the circumstances in *Lowe* where "every aspect of [the defendant's] employment was exactly the same as it would have been had there been no contract with any governmental agency of any kind." *Lowe,* 141 F.2d at 1006. For similar reasons this case is distinguishable from *Blankenship,* where the USDOT's power to act on

the fraudulent documents submitted by the defendants was, in the words of the *Blankenship* court, "embarrassingly weak and indirect." *Blankenship,* 382 F.3d at 1136. Accordingly, we find neither case directly analogous to the case before this Court.[FN2]

> FN2. We note that, to the extent that *Lowe* is similar to this case, nearly every court to consider it has either distinguished it or rejected it. *See Blankenship,* 382 F.3d at 1145-48 (Black, J., concurring in part and dissenting in part) (explaining that even within the Fifth and Eleventh Circuits, *Lowe* is inconsistently followed, and often distinguished).

Jackson also relies on *United States v. Facchini* in support of his position. His reliance, however, is misplaced. *Facchini* concerns false statements made by defendants to the Oregon Division of Employment to receive unemployment insurance benefits. The Oregon program paid benefits primarily with state funds, but received administrative funds and guidelines from the Department of Labor ("DOL"). The court in that case analyzed two separate groups of defendants: those who received money only from the State of Oregon, and those who received supplemental benefits from the DOL. Though it is true that the court found no jurisdiction as

to the first group because the connection to the federal government was too attenuated, it easily found jurisdiction to exist for the second, namely "because [the defendants'] false statements gained them benefits paid out of the federal fisc...." *Facchini,* 874 F.2d at 643. There the court found, as do we, that "there is a direct relation between the falsity of [the] statements and the [federal government's duty] of certifying the payment of federal money...." *Id.* Therefore, *Facchini* actually supports the conclusion that we reach today.

*200 III.

For the reasons stated, we find that Jackson's false statements on his timesheets, which were transmitted to CSC, and from CSC to NSA, and ultimately paid by NSA, are matters within the jurisdiction of the executive branch under § 1001, and accordingly affirm the decision of the district court.

AFFIRMED.

False Statements Act, 18 U.S.C. § 1001

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully -

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to-

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with the applicable rules of the House or Senate.

4814-5645-1079, v. 2

No. 10-385

In the Supreme Court of the United States

JAMES E. JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's submission of false timesheet information to a subcontractor providing services under a government contract with the National Security Agency (NSA) concerns a "matter within the jurisdiction of the executive * * * branch," 18 U.S.C. 1001(a), where the false information was transmitted to the NSA and caused the NSA to pay for services that it never received.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 608 F.3d 193. The opinion of the district court (C.A. J.A. 204-208) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2010. A petition for a writ of certiorari was filed on September 17, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the entry of a conditional guilty plea in the United States District Court for the District of Maryland, petitioner was convicted on three counts of knowingly and willfully making material false statements in a matter within the jurisdiction of the executive branch

of the Government of the United States, in violation of 18 U.S.C. 1001. The district court sentenced petitioner to 30 days of imprisonment, to be followed by two years of supervised release, and ordered petitioner to pay $74,346 in restitution. C.A. J.A. 241-245. The court of appeals affirmed. Pet. App. 1-17.

1. In or about July 2003, the National Security Agency (NSA), a component of the United States Department of Defense, entered into a contract with Computer Sciences Corporation to obtain certain messaging services. Computer Sciences Corporation entered into a subcontract with a division of Northrop Grumman Corporation to provide services to the NSA under the NSA contract. Northrop Grumman, in turn, employed petitioner to work full-time on the NSA contract. Pet. App. 5; C.A. J.A. 217.

Petitioner's sole duty station with respect to the NSA contract was at the NSA's headquarters at Fort Meade, Maryland, and petitioner was required to be at that duty station in order to work on the contract. Petitioner's access to NSA Headquarters and the classified information necessary to perform his job was subject to a continuing grant of access by the NSA. The NSA possessed authority to suspend or revoke that grant of access to petitioner if, for instance, it determined that petitioner had submitted timesheets falsely claiming to have performed work under the NSA contract that he did not actually perform. The NSA also possessed authority to obtain directly the timesheets and billing records relating to petitioner in order to investigate an allegation suggesting that petitioner had submitted false timesheets. The NSA then could have resolved any associated overpayment by demanding repayment from Computer Sciences Corporation and could have terminated

its contract with that company if such deficiencies with subcontractor personnel were not adequately remedied. Pet. App. 5-7, 12; C.A. J.A. 217-218.

Between September 2004 and January 2007, petitioner submitted numerous false timesheets to Northrop Grumman that fasely claimed that petitioner had worked roughly 834 more hours on the NSA contract than he actually had worked. Pet. App. 5-6. That false information was then "transmitted * * * to NSA," which paid Computer Sciences Corporation for the falsely claimed services. *Id.* at 6, 17. Petitioner's false statements ultimately caused the government to pay approximately $74,346 for services that it never received. C.A. J.A. 245; cf. *id.* at 218.

2. In March 2009, a federal grand jury indicted petitioner on 20 counts of knowingly and willingly making false statements, in violation of 18 U.S.C. 1001, by submitting 20 fraudulent timesheets for 20 different pay periods. C.A. J.A. 7-11. As relevant here, Section 1001 provides that "whoever, in any matter within the jurisdiction of the executive * * * branch of the Government of the United States, knowingly and willfully—* * * (2) makes any materially false, fictitious, or fraudulent statement or representation" shall be fined, imprisoned, or both. 18 U.S.C. 1001(a).

Petitioner moved to dismiss the indictment, arguing that his timesheets did not reflect false statements in a matter within the jurisdiction of the executive branch within the meaning of Section 1001. C.A. J.A. 12-23. The district court denied the motion. *Id.* at 204-208. The court concluded that petitioner's alleged submission of false timesheet information to Northrop Grumman, which allegedly caused the NSA to pay Computer Sciences Corporation for time that petitioner falsely

claimed to have worked, itself provided "the required jurisdictional nexus" under Section 1001 because the false statements were made in a matter "within the jurisdiction of NSA." *Id.* at 206. The district court noted that "[c]ourts do not require that a federal agency have any direct supervisory power over a defendant in order to have jurisdiction under § 1001," *ibid.*, and concluded that there were "a myriad of other ways" in which the NSA had authority with regard to petitioner's alleged false statements beyond the NSA's responsibility for its payment of funds. *Id.* at 207. The NSA, the court explained, had authority effectively to "end[] [petitioner's] work on the contract" for submitting false timesheet information because it "could have suspended or revoked [his] access to NSA facilities and information" for such conduct. *Ibid.* The court also concluded that the NSA "had the option of terminating its contract with" Computer Sciences Corporation based on deficiencies caused by an employee of the company's subcontractor. *Id.* at 207-208.

Petitioner subsequently entered into a conditional plea agreement under which he agreed to plead guilty to three of the 20 counts of the indictment while reserving his right to appeal from the order denying his motion to dismiss. C.A. J.A. 209-219; cf. *id.* at 217-219 (stipulation of facts). The district court accepted petitioner's conditional guilty plea and found petitioner guilty on three counts of making false statements, in violation of 18 U.S.C. 1001. C.A. J.A. 237, 241.

3. The court of appeals affirmed. Pet. App. 1-17. The court of appeals concluded that petitioner's "false timesheets fell within the jurisdiction of the executive branch." *Id.* at 9. The court agreed with other courts of appeals that "the executive branch has the authority (if

not the duty) not to pay a false invoice, no matter through how many intermediaries' hands it passes" and that the submission of such a false statement prompting a federal payment falls within the ambit of Section 1001. *Id.* at 9-10, 11 n.1. Such a false statement is a statement in a matter within the jurisdiction of the executive branch, the court explained, because "the authority to safeguard federal funds" is not "merely peripheral, but rather [is] an official, authorized function of the executive branch." *Id.* at 11.

Although it reasoned that "the executive branch's authority to safeguard federal funds is a sufficient jurisdictional nexus on its own," the court of appeals also concluded "other, even more direct controls that the executive branch exercised over [petitioner]" demonstrated that petitioner's false statements were made in a matter within the jurisdiction of the executive branch. Pet. App. 12. The court explained that the NSA had the power to "effectively terminate [petitioner's] employment" working on the NSA contract, by revoking his security clearance and preventing his access to his job site at NSA Headquarters. *Ibid.* That control, when "[t]aken together" with the NSA's right to terminate its contract with Computer Sciences Corporation and its "power to safeguard federal funds," provided "an ample basis to find federal jurisdiction" under Section 1001. *Ibid.*

The court of appeals rejected petitioner's reliance on *Lowe* v. *United States*, 141 F.2d 1005 (5th Cir. 1944), and *United States* v. *Blankenship*, 382 F.3d 1110 (11th Cir. 2004), cert. denied, 546 U.S. 828 (2005). Pet. App. 12-16. The court explained that *Lowe* was distinguishable from petitioner's case because, although it involved false statements made by the employee of a private com-

pany that had contracted with the United States, the employee's "employment was entirely unaffected by the existence of the federal contract." *Id.* at 15. The court similarly concluded that *Blankenship* was inapposite. In *Blankenship*, the false statements related to a scheme whereby a minority-owned business pretended to do work that was actually performed by a non-minority business. The minority-owned business subcontracted with a contractor that in turn contracted with the State of Florida, which in turn had received federal money requiring the involvement of minority-owned businesses in the project. As the court of appeals in this case explained, the federal agency in *Blankenship* "had no direct control over the defendants" and could have responded to the false statements only by attempting to pressure a state agency to exert pressure on the private company with which the state had contracted in order to take action against the subcontractor and those who had made the false statements at issue. *Id.* at 14-16.

ARGUMENT

Petitioner contends (Pet. 6-14) that his false statements concerning the time that he worked on the NSA contract fall outside the jurisdictional reach of 18 U.S.C. 1001 because they do not constitute statements in a "matter within the jurisdiction of the executive * * * branch," 18 U.S.C. 1001(a). That is incorrect. The court of appeals correctly held that Section 1001's jurisdictional predicate was satisfied in this case, and the court's decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Section 1001 requires that a knowingly and willfully false statement must be made "in a[] matter within

the jurisdiction of the executive * * * branch of the Government of the United States." 18 U.S.C. 1001(a). The "primary purpose" of that "jurisdictional requirement" is "to identify the factor that makes the false statement an appropriate subject for federal concern." *United States* v. *Yermian*, 468 U.S. 63, 68 (1984). Petitioner's false statements regarding the time that he purportedly worked on an NSA contract were transmitted to the NSA and directly caused the Executive Branch to pay for services that it never received. Those false statements plainly concern an appropriate subject for federal concern and fall within the reach of Section 1001's jurisdictional threshold.

Section 1001's direct statutory predecessor originally applied only to false statements that caused "pecuniary or property loss" to the Federal government. *United States* v. *Gilliland*, 312 U.S. 86, 92 (1941) (quoting *United States* v. *Cohn*, 270 U.S. 339, 347 (1926)). Congress expanded the statute in 1934 by removing the text limiting the statute to falsehoods causing monetary harm, replacing it with the statutory requirement that the false statement be made "in any matter within the jurisdiction of any department or agency of the United States." *Id.* at 93; see *id.* at 92-94. That "broad language" covering any false statement made in "any matter" within the government's jurisdiction extended the statute's reach beyond matters "'in which the Government has some financial or proprietary interest'" to false statements that, *inter alia*, would pervert "'the authorized functions of government departments and agencies.'" *United States* v. *Rogers*, 466 U.S. 475, 480, 482 (1984) (quoting *Gilliland*, 312 U.S. at 91, 93); see

also *Brogan* v. *United States*, 522 U.S. 398, 403-404 (1998).[1]

In other words, "the phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Rogers*, 466 U.S. at 479. This Court has "stressed that 'the term "jurisdiction" should not be given a narrow or technical meaning'" in this context, *id.* at 480 (quoting *Bryson* v. *United States*, 396 U.S. 64, 70 (1969)), and has concluded that a matter falls within agency's "jurisdiction" under Section 1001 if the agency "has the power to exercise authority in a particular situation." *Id.* at 479. "Jurisdiction" under Section 1001 thus "mean[s] simply the power to act upon information when it is received." *Ibid.* (quoting *United States* v. *Alder*, 380 F.2d 917, 922 (2d Cir.), cert. denied, 389 U.S. 1006 (1967)).

Congress's decision to expand the statute beyond false statements causing the government financial harm did not discard the statute's original concern with such statements, which continue to lie at the core of Section 1001. Moreover, this Court has held that an employee's false statements to his private-sector employer fall within Section 1001 where, as here, the employer was a

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[1] After this Court held that Section 1001 did not apply to false statements made in any matter subject to the jurisdiction of a federal court, see *Hubbard* v. *United States*, 514 U.S. 695, 715 (1995), Congress in 1996 again amended and expanded Section 1001 to apply to statement made in any matter "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." See False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (amending 18 U.S.C. 1001(a)); H.R. Rep. No. 680, 104th Cong., 2d Sess. 2, 8 (1996). That amendment did not alter the scope of the statute in a manner material to this case, which concerns false statements in a matter within the jurisdiction of the Executive Branch.

government contractor that "transmitted [the false statements] to a federal agency" in connection with its government contract. *Yermian*, 468 U.S. at 66, 75 & n.14 (holding that a defendant need not "actually kn[o]w that [his false statements] were being submitted to the Federal Government," at least where such transmission was reasonably foreseeable); see Pet. App. 9, 11 n.1 (explaining that false statements regarding government payments are unlawful even when the false statements pass through "intermediaries' hands" before reaching the government; concluding that petitioner "cannot do indirectly that which he is prohibited from doing directly"). Under this Court's decisions, therefore, petitioner's false statements, which were transmitted to the NSA and directly injured that agency by causing it to pay for services that it never received, concern a matter within the "jurisdiction of the executive branch."[2]

Moreover, as the court of appeals explained, "other, even more direct controls that the executive branch exercised" here demonstrate that petitioner's false statements were made in a matter within the jurisdiction of the executive branch. Pet. App. 12. The NSA had authority effectively to terminate petitioner's work on the NSA contract based on his submission of false timesheet information, because the NSA had authority to respond to such misconduct by suspending or revoking petitioner's access to the NSA facilities and classified information that petitioner needed to do his job. The NSA also had authority to obtain that timesheet information concerning petitioner to investigate such misconduct and could redress such actions by subcontactor person-

[2] Petitioner has not argued in his petition for a writ of certiorari that it was not reasonably foreseeable that his false statements would be transmitted to the NSA by his employer.

nel under its contract with Computer Sciences Corporation. See pp. 2-3, *supra*; C.A. J.A. 217-218. The NSA's "power to exercise authority in [this] particular situation" concerning the false timesheet information transmitted to it, including the NSA's "power to act upon [such] information when it is received," *Rogers*, 466 U.S. at 479-480, establishes that petitioner's false statements were made in a matter within the "jurisdiction" of the NSA.

2. Petitioner acknowledges that a number of the courts of appeals have concluded that false statements which cause payments to be made from "the public fisc" are sufficient to trigger Section 1001's jurisdictional threshold. Pet. 9-11 (citing Pet. App. 9-11). Petitioner, however, argues that three decisions—*Lowe* v. *United States*, 141 F.2d 1005 (5th Cir. 1944); *United States* v. *Blankenship*, 382 F.2d 1110 (11th Cir. 2004), cert. denied, 546 U.S. 828 (2005); and *United States* v. *Holstrom*, 242 Fed. Appx. 397 (9th Cir. 2007) (unpublished decision)—conflict both with that majority rule and with the court of appeals' decision in this case. Pet. 11-14. That contention lacks merit.

a. The Fifth Circuit in *Lowe* concluded that Section 1001's predecessor did not apply where Lowe falsely represented to his private employer the hours that he worked on a government shipbuilding project. The court concluded that the "alleged fact that the United States reimbursed the company for its payroll payments" under a shipbuilding contract was not "sufficient" by itself to trigger the statutory prohibition where the "control and supervision" of Lowe's duties fell within "the exclusive dominion of his private employer" and "every aspect of [Lowe's] employment was exactly the same as it would have been had there been no con-

tract with any government agency." 141 F.2d at 1006. Government contracts need not provide for direct reimbursement of a contractor's payroll expenses, and nothing in *Lowe* indicates that it would have been reasonably foreseeable that Lowe's false statements would have been transmitted to the government. The Fifth Circuit has accordingly treated its 1944 decision in *Lowe* as applying only where it "was not apparent whether the matters involving private contractors" involved a matter within the government's jurisdiction. *United States* v. *Baker*, 626 F.2d 512, 515 n.6 (1980); cf. *id.* at 514 & n.5 (finding Section 1001 applicable where employees' false statements regarding the time they worked on a federally funded project were transmitted to the federal agency that funded the project). As it is understood in the Fifth Circuit, *Lowe* does not conflict with the decision below.

The Eleventh Circuit's decision in *Blankenship* likewise does not support further review. In *Blankenship*, the U.S. Department of Transportation (USDOT) provided grants to the Florida Department of Transportation (FDOT) under a contract that required FDOT to ensure that 12% of the federal funds went to disadvantaged business enterprises (DBEs). 382 F.3d at 1116. FDOT, in turn, contracted with Granite Construction (a private company) to work on a federally funded highway project, requiring Granite to ensure that 12% of its subcontracts were set aside for DBEs. *Ibid.* Granite then subcontracted with H.J. Trucking (a DBE) but the subcontracts and associated materials contained false statements by H.J. Trucking and others that concealed the fact that another non-DBE company was simply exploiting H.J. Trucking's DBE license to perform the subcontracted work. *Id.* at 1116-1118. In that context, *Blank-*

enship explained that USDOT was "powerless to 'exercise authority' over either Granite or the defendants" who made the false statements; "lacked the power to compel either * * * to rescind or modify [their subcontracting] agreement"; and instead could look "solely to the FDOT to implement its contractual obligations" to the federal government. *Id.* at 1136-1137. That "embarrassingly weak and indirect avenue of recourse," the court reasoned, was insufficient to establish USDOT's authority over Granite and the defendants and, therefore, was insufficient to bring the matter within the jurisdiction of USDOT. *Id.* at 1137. *Blankenship* does not address circumstances where, as here, a defendant's false statements directly cause the government to make payments that it otherwise would not have made. And although the Eleventh Circuit in *Blankenship* criticized its own decisions (including prior binding Fifth Circuit precedent) indicating that the expenditure of federal funds will normally be sufficient to establish "jurisdiction" under Section 1001, *id.* at 1139-1140 & n.33, that intra-circuit tension does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In any event, the court of appeals correctly concluded that the NSA's authority to terminate petitioner's work on the contract based on his submission of false timesheet statements and its authority over the NSA contract distinguishes this case from *Lowe* and *Blankenship*, which addressed circumstances in which a federal agency had no similar authority over the matter at hand. Pet. App. 15. *Lowe* and *Blankenship* therefore do not address cases like this, where an Executive Branch agency not only is harmed financially by the defendant's false statement but also has the power to act

on the false information transmitted to it by taking action against the defendant both directly (by terminating the defendant's work on the government contract) and indirectly (through its exercise of contract rights).

b. Finally, petitioner relies (Pet. 11-12) on the Ninth Circuit's unpublished decision in *Holstrom*. That reliance is misplaced. The court in *Holstrom* concluded that Holstrom's submission of false time-card information to her government-contractor employer did not fall within the jurisdiction of the Department of Energy (DOE) because the government "failed to show that DOE had the 'power to act' with regard to Holstrom's allegedly false time card entries" and the evidence demonstrated that Holstrom's private-sector employer "was wholly responsible for 'the total performance under the contract' including all 'disciplinary action.'" 242 Fed. Appx. at 398-399. Under those circumstances, the court concluded that Holstrom's false statements were "not directly related to any DOE-authorized function," without discussing whether those statements were transmitted to DOE or caused DOE to make payments for work it never received. *Ibid.* *Holstrom* thus does not address the circumstances at issue here, where the NSA had several ways to exercise authority over petitioner's false statements. In any event, *Holstrom* is not a precedential decision, need not be followed in subsequent cases, see 9th Cir. R. 36-3(a), and thus does not reflect a division of authority warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010